SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 169

PACIFIC ELECTRIC RAILWAY COMPANY,

Petitioner,

vs.

ERNEST H. THAYER,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Pacific Electric Railway Company, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California, entered March 2, 1961, affirming a judgment of the Superior Court of the State of California, in and for the County of Los Angeles.

Opinions Below.

1. The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division 2, reversing the judgment of the Superior Court, is reported at 184 A. C. A. 120, 7 Cal. Rptr. 222, and is printed in Appendix "A" hereto, *infra*, pages A1 to A10.

2. The opinion of the Supreme Court of the State of California, affirming the judgment of the Superior

Court, is reported at 55 A. C. 432, 11 Cal. Rptr. 500, 300 P. 2d 56, and is printed in Appendix "B" hereto, *infra,* pages B1 to B11.

Jurisdiction.

1. The judgment of the Supreme Court of the State of California sought to be reviewed herein was entered on March 2, 1961.

2. Petitioner's timely Petition for Rehearing, filed March 17, 1961, was denied by the Supreme Court of California on March 29, 1961.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U. S. C. 1257(3) since the validity of a statute of the United States is drawn in question.

Question Presented.

Where there is damage to a freight shipment moving in interstate commerce and applicable bill of lading contractual provision provides as a condition precedent to recovery that claim must be filed in writing within a nine months' period, is there a compliance with such provision when delivering carrier's agent makes an inspection of the damage and issues an inspection report, and later, following an oral discussion concerning the damage with owner of the shipment within the nine months' period, writes on carrier's copy of the freight bill "Damage on this shipment" but no written claim or any other writing is filed by the owner or anyone else within said period?

Statutory Provisions Involved.

The statute principally involved is Section 20(11) of the Interstate Commerce Act (Transportation Act, 1920; 49 U. S. C. 20(11)), the pertinent part of which provides as follows:

> "*Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: . . ."

Pursuant to said provision of law, the petitioner published in its tariff, duly posted and filed with the Interstate Commerce Commission according to law, a bill of lading contract term and condition providing, in part, in Section 2(b) thereof, as follows:

> "(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property. . . . Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims shall not be paid." [Trial Court Ex. "C".]

Collaterally involved is Section 3(1) of the Interstate Commerce Act (Hepburn Act, 49 U. S. C. 3(1)) which provides, in part:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

Also, Section 6(7) of the Interstate Commerce Act (Hepburn Act, 49 U. S. C. 6(7)) which provides, in part:

> ". . . nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Also, the Elkins Act, 49 U. S. C. 41(1), which provides, in part:

> ". . . The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give,

or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. . . ."

Statement of the Case.

1. Proceedings in the Courts Below.

The case was reviewed on appeal by the District Court of Appeal and by the Supreme Court of California on the record made in the trial court, the Superior Court of Los Angeles County. That record is embodied in the Clerk's Transcript, hereinafter referred to as "C. T.," and a Reporter's Transcript, hereinafter referred to as "R. T." One certified copy of each, together with certified copies of decisions of California District Court of Appeal and California Supreme Court and copy of Petition for Rehearing in California Supreme Court are transmitted with this petition.

Additionally, original exhibits received in evidence at trial of the case, and which are pertinent to this petition, are being transmitted directly by the Clerk of the trial court to this Court.

The pleadings establish that the respondent was the owner and consignee of a grinding machine shipped by railroad under a Uniform Straight Bill of Lading from Parkridge, Illinois, to Artesia, California [C. T.

pp. 2, 5]. The petitioner, a common carrier by railroad, was the delivering carrier. The machine was damaged during transit, but was unlocated, that is, it could not be determined which of the railroads participating in transportation of the shipment was responsible for the damage [Findings of Fact VII, C. T. p. 15]. Upon delivery on March 29, 1955, the respondent discovered the machine was damaged and thereupon asked the petitioner to send a representative to inspect it [R. T. p. 8]. This inspection was made the following day by a railroad agent, who reduced his findings to a written inspection report [Trial Court Ex. "A"; R. T. p. 22]. Following the inspection, the railroad agent handed respondent blank claim forms to be filled out by respondent and returned to petitioner [R. T. pp. 8-9; p. 22, line 25, to p. 24, line 4]. The next contact between the parties occurred on April 20, 1955, when the railroad agent went to respondent's office to collect the freight charges. At that time, a conversation ensued which was summarized by respondent in response to questions by his counsel, as follows [R. T. p. 12, line 17, to p. 13, line 11]:

> "Q. What was the substance of the conversations that you had with him at that time? A. I hadn't paid the bill up to that time. I hesitated to pay it, as I told Mr. Hileman, because they had damaged the machine, and I felt that they owed me money. But Mr. Hileman informed me that that was a separate matter and had nothing to do with the bill of freight, and it was necessary that I pay that anyhow. To this I objected. I thought it might be considered an overall settlement, and I didn't want to waive my rights to collect for the

damages, but he insisted that I would have to pay the bill, so he finally made a notation on one of his records to the effect that the machine had been damaged in shipment, and I went ahead and paid him and collected a receipt for it.

Q. All right. Now, to your knowledge, did he take this document with him that he made this notation on? A. Yes, he did.

Q. And would you have paid him the bill if he had not made this assurance to you and made the notation that he did? A. I would not."

The notation respondent saw the railroad agent make was "Damage on this shipment, 4-20-55, C. D. Hileman." [Trial Court Ex. 7.] The first writing emanating from the respondent to the petitioner concerning a claim for damages was a letter dated January 27, 1950, received by petitioner on January 30, 1950, which was more than nine months after date of delivery [R. T. p. 18].

Respondent did not know about the existence of the inspection report [Trial Court Ex. "A"] until the week of the trial [R. T. p. 22, lines 4-22]. The trial of the case commenced March 24, 1959 [C. T. p. 14, line 17], approximately a week short of four full years after date of delivery.

The petitioner defended the case on the grounds that respondent did not comply with the provisions of Section 2(b) of the bill of lading issued for the transportation of the shipment, which required, as a condition precedent to recovery, claims to be filed in writing within nine months after delivery of the property [C. T. p. 6].

Section 2(b) of the bill of lading is contained in petitioner's tariffs on file with the Interstate Commerce Commission at the time said shipment was transported. A certified copy of said Section 2(b) was received in evidence [Trial Court Ex. "C"].

The trial court found that respondent had presented a claim in writing within the meaning of Section 2(b) on April 20, 1955 [C. T. p. 15, line 32, to p. 16, line 2], and hence was allowed to recover. The District Court of Appeal reversed this judgment and ordered judgment in favor of the petitioner (Appendix A). The Supreme Court of California granted a hearing and thereafter affirmed the judgment of the trial court (Appendix B).

2. How the Federal Question Was Presented.

The contention that a decision on these facts should be governed by Federal law was made by petitioner in briefs filed in the trial court and on appeal. The trial court recognized this to be a valid contention when he stated [R. T. p. 93, lines 17-19]:

> "The case, of course, is governed by the decisions of the courts of the United States and not by the rule of law as laid down by the California courts."

Again the trial judge stated [R. T. p. 94, lines 1-7]:

> "The Federal decisions, as may be expected, and as is found also in our State decisions, are not entirely in harmony as to what is a sufficient writing to constitute a claim within the Carmack Amendment. I believe it is Subdivision 2, Article 49.
>
> Mr. Steiger (Petitioner's counsel): The citation, your Honor, is 49 USCA, Paragraph 20 sub paragraph 11."

The District Court of Appeal recognized that Federal law must be applied to the facts of this case, stating (Appendix "A," pp. A3-A4):

> "It is evident from the posture of the case and the agreement of the parties that (1) Federal Law, as enunciated by the Carmack Amendment to the Interstate Commerce Act (Title 49 U.S.C.A. §20(11)), controls the rights of the parties under the bill of lading; (2) the Carmack Amendment requires filing of a written claim within nine months as a condition precedent to suit upon the bill of lading; and (3) the question of 'law what constitutes a claim "in writing" within the meaning of the bill of lading provisions, and whether there may be a "waiver" or an "estoppel" dispensing with the necessity of compliance with such a condition, are 'federal' questions on which the Supreme Court of the United States has the final word.' *Insurance Co. of North America v. Nevada Nevada Mfg. Co.*, 187 F. 2d 675, 680; *Northern Pac. Ry. Co. v. Mackie*, 195 F. 2d 641, 642; *Georgia Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 195, 36 S. Ct. 541, 60 L. Ed. 948.)"

"The plaintiff's letter (p. 5) contained the following: 'Respondent refuses to accept the filing of a claim as a condition precedent to suit under the bill of lading . . . and that rights of the parties under the bill of lading is a matter of Federal Law.'"

The Supreme Court of California also recognized that the case is governed by Federal law, stating (Appendix "B," pp. B5-B6):

> "Whether the plaintiff complied with the requirements of Section 2 (b) of the bill of lading for this interstate shipment presents a question of fed

eral law. (Chesapeake & Ohio Ry. v. Martin, 283 U. S. 209, 213, 221, 51 S. Ct. 453, 75 L. Ed. 983; . . . ."

Reasons for Granting the Writ.

1. Decisions Interpreting Bill of Lading Time Limitation Requirements Conflict in Law and in Principle.

This Court has given previous consideration to the proper interpretation of time limitation clauses, such as Section 2(b) of the Bill of Lading Contract Terms and Conditions, which is involved in the instant litigation. The Federal and State Appellate Courts, however, have not been uniform in following the interpretation of such time limitation clauses as heretofore expressed by this Court. Conflicting decisions of Federal and State Appellate Courts have resulted, and there is confusion and uncertainty as to the rights and obligations of rail and motor carriers as well as shippers and consignees of interstate shipments throughout the United States.

The decisions of this Court which have given direct consideration to a time limitation clause such as here involved were decided more than 30 years ago. While the period of time varied, all of the limitation clauses involved in these prior decisions required that a claim or notice in writing be filed with the carrier. *Georgia, Florida and Alabama Railway Company v. Blish Milling Company* (1916), 241 U. S. 190, 193, held that a requirement of a claim in writing was satisfied by a telegram sent by the claimant reading: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle." There were other writings addressed by the claim

ant to the carrier which identified the shipment. The Court emphasized that the bill of lading stipulation required that the claim should be made in writing; that this contractual provision could not be waived; nor could the carrier by its conduct be estopped or give the shipper the right to ignore the stipulation.

In other cases this Court has held that verbal notice to the carrier's agent or actual knowledge of the carrier as to existence of damage does not relieve a shipper or owner of the necessity of complying with a time limitation clause. *St. Louis, Iron Mountain & Southern Ry. v. Starbird* (1917), 243 U. S. 592, that verbal notice to the carrier and actual knowledge of damage by the carrier, coupled with efforts by the carrier to negotiate a compromise of damages suffered did not constitute a waiver of a time limitation clause. *Southern Pacific Co. v. Stewart* (1919), 248 U. S. 446; that mis-delivery of a shipment did not estop the carrier from asserting failure to comply with a time limitation clause as to do so would alter terms of a contract made in pursuance of the Interstate Commerce Act and having in effect the quality of a statute of limitation. *Chesapeake & Ohio R.R. Co. v. Martin* (1931), 283 U. S. 209.

The Federal and State Appellate Courts have not been uniform in following the interpretation placed by this Court on bill of lading limitation clauses in their consideration of Section 2(b) of the bill of lading contract terms and conditions as presently set forth in carrier's tariffs on file with the Interstate Commerce Commission. In *Harper Paper Co. v. Baltimore & O. R.R.* 7 Cir., 178 F. 2d 179 (1949), certiorari denied, 339 U. S. 913 a shipment was destroyed in a wreck, the carrier had knowledge of all the circumstances and in

formed the shipper of the damage, but no claim in writing was filed within the nine months' period. It was held that the filing of a claim in writing was not necessary.

In *Lehigh Valley R. Co. v. Russia*, 2 Cir., 21 F. 2d 396 (1927), certiorari denied, 275 U. S. 571, a shipment of explosives was destroyed at destination prior to delivery. The destination carrier wrote shipper giving him information as to damage and told him to file a claim with the Pennsylvania Railroad, which was not the carrier against whom a claim should have been filed. Held that carrier was estopped to assert defense that claim had not been filed in time and that the circumstances complied with requirement that claim be filed in writing.

In *Loveless v. Universal Carloading & Distributing Company*, 10 Cir., 225 F. 2d 637 (1955), it was also held that actual knowledge on the part of the carrier of the existence of damage and the fact that it had made an admission in writing of such knowledge constituted a compliance with Section 2(b) of the bill of lading, and it was immaterial that the shipper had not filed a claim in writing as prescribed in that section.

Again, in the instant case decided by the Supreme Court of California, it was held to be of no consequence that a claim in writing had not been filed by the claimant within the period prescribed in the bill of lading. That Court concluded that a written inspection report by carrier's agent of the damage and a notation by the agent on a shipping document reading "Damage on this shipment" coupled with oral discussions between the claimant and carrier's representative consti-

tuted a compliance with the bill of lading section. Equitable considerations of waiver and estoppel actually form the bases for recovery in these cases although a discussion thereof is for the most part avoided.

On the other hand, numerous decisions have reached an opposite conclusion under similar or identical facts where waiver and estoppel is discussed in the opinions, is rejected as not applicable, and recovery denied.

In *Texas & New Orleans Railroad v. McNatt* (C. C. A. Tex.) 223 S. W. 2d 651 (1949) (writ of error to the Texas Supreme Court refused), there was damage to a piano. The carrier inspected and confirmed the damage in a written inspection report issued by its agent, and in the presence of the shipper wrote on the report "will repair." This was held not to be a compliance with the bill of lading section, which required a claim in writing to be filed by the claimant.

In *Southern Newspapers Inc. v. Missouri Pacific Railroad*, 216 Ark. 831, 227 S. W. 2d 639 (1950), there was damage to a linotype machine. At request of the consignee, carrier's agent made an inspection and issued a report confirming the existence of damage. No claim was filed within the specified nine months' period, and it was held the carrier was not liable because of failure to file a claim in writing as provided in the bill of lading section.

Berg v. Schreiber, 405 Ill. 528, 92 N. E. 2d 88 (1950), certiorari denied, 340 U. S. 851, concerns damage to a shipment of jeep parts. An adjuster for defendant motor carrier with the assistance of plaintiff made a list of the damaged parts, a copy of which was given to plaintiff. There was no other writing within

the prescribed nine months' period, and it was held the carrier was not liable.

In *Insurance Company of North America v. Nettotome*, 1 Cir., 187 F. 2d 675 (1951), there was a dispute with respect to loss of a shipment by a motor carrier. There was no claim in writing filed by the claimant, but immediately following the loss there were numerous discussions between plaintiff and defendant carrier, in one of which the latter was given copies of bills of lading and other documents to support the claim of loss which was orally made. The failure to file a claim in writing was held to constitute a bar to the action.

Delphi Frosted Foods Corp. v. Illinois Central Railroad Co., 6 Cir., 188 F. 2d 343 (1951), certiorari denied (because petition not filed in time), 342 U. S. 833, shipments of frozen fruit arrived at destination in a damaged condition, which was confirmed by carrier inspection. Claim in writing was filed within nine months' period by customers of shipper, but their suit to recover damages was unsuccessful because it developed title had not passed to them. Shipper filed no claim in writing but brought suit contending written claims filed by their customers were sufficient compliance with Section 2(b), as carrier had thereby been informed of and had knowledge of the loss and damage. Held that the shipper had not complied with Section 2(b) of the bill of lading and therefore was not entitled to recover.

Appalachian Electric Power v. Virginian Ry., 126 W. Va. 626, 29 S. E. 2d 471 (1944), there was damage to a shipment of transformers which was called to attention of defendant carrier's agent at destination.

The latter noted on the freight bill, "transformers damaged when received * * *", and gave this document to plaintiff's agent. Carrier's agent also prepared and sent to his superior an inspection report of the damage. The Court concluded there was no claim in writing and therefore no recovery was permitted.

Northern Pacific Ry. v. Mackie, 9 Cir., 195 F. 2d 641 (1952), there was damage to a shipment of plywood, which was ultimately rejected by the consignee and sold by the carrier at destination as salvage. Carrier's agent inspected the shipment and issued a damage report. There were oral discussions between shipper and origin carrier concerning a claim, but there was no claim in writing filed within the nine months' period. Previous decisions of the United States Supreme Court were interpreted as requiring a claim in writing, and it was concluded the circumstances here involved did not constitute a compliance with the bill of lading section.

In *East Texas Motor Freight Lines v. United States,* 5 Cir., 239 F. 2d 417 (1956), the consignee asserted that even though he did not send a written claim to the carrier that two writings, both made by the carrier, constituted his claim in writing. The first was an accident report detailing the facts of the accident in which the consignment was damaged, and the second was a "Report of Loss or Damage to Freight Inspected after Delivery." It was held that knowledge acquired by the carrier of the damage, coupled with the carrier's own writings, did not relieve the claimant of the obligation of complying with the notice requirements.

In *Penn State Laundry Co. v. Pennsylvania R. Co.,* 134 Fed. Supp. 955 (D. C. 1955), plaintiff sought to

avoid the requirement of the bill of lading on the ground that plaintiff gave oral notice to the carrier, endeavored to obtain payment of the claim, and that the carrier itself prepared a damage report as a result of such oral notice. The Court rejected the plaintiff's contention that written notice was waived or should not be required in the presence of actual notice. The judgment was for the carrier.

In *Louda v. Prague Assurance-National Corp.*, 347 Ill. App. 211, 106 N. E. 2d 757 (1952), the claimant actually sent a letter to the carrier within the nine months' period entitling his letter "Re: Claim of Frantisek Louda." However, there was nothing in the letter itself to indicate that a claim was being made against the defendant. The Court held that this letter, together with knowledge on the part of the carrier's agent of damage to the shipment, does not dispense with the obligation of complying with the bill of lading requirement.

It is respectfully submitted that it is not possible to reconcile the decisions of the opposing authorities. They all involve essentially the same fact situations, *i.e.*, (1) the carrier had knowledge of damage to a shipment either as result of a verbal notice or as result of its own inspection, or both, (2) in none of the cases was there a writing of any kind whatsoever emanating from the claimant, except in the *Louda* case, *supra*. Nevertheless, in some cases the courts have held there was a compliance with the bill of lading section, while in other cases it is held that there was no compliance. There is a direct conflict in the authorities cited on facts that are substantially indistinguishable.

2. Importance of the Question.

An issue of great moment to the public is present in this case. Hundreds of thousands of shipping transactions are consummated every working day in the United States. In every instance where a public carrier of freight is involved in a for-hire transportation transaction, a bill of lading is issued. In interstate shipments, liability for freight loss and damage is governed by the terms and conditions of the bill of lading "whether such receipt or bill of lading has been issued or not. . . ." (49 U. S. C. 20 (11).) No other form of written contract is entered into in such volume in the United States as the bill of lading contract.

The terms and conditions of the bill of lading are published in the carrier's tariffs on file with the Interstate Commerce Commission. They apply to large carriers as well as small carriers; to large shippers as well as small shippers. To grant preferences would constitute discrimination, which is prohibited by Sections 3-(1) and 6(7) of the Act, and is also made a crime by the Elkins Act (49 U. S. C. 41-43). There should be no flexibility in the enforcement of tariff rules and regulations. Equity should play no part, and as held by this Court in *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U. S. 94, deviation from the provisions of tariffs is not permitted *upon any pretext*. As stated in 237 U. S. 94, 97:

> "This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Carriers of necessity must decline to pay all claims that are not timely filed. To pay some and not all would be obvious discrimination. In *Chesapeake & Ohio R. Co. v. Martin*, 283 U. S. 209, 222, it was said concerning estoppel:

> "To allow it would be to alter the terms of a contract, made in pursuance of the Interstate Commerce Act and having, in effect, the quality of a statute of limitation, and thus to open the door for evasions of the spirit and purpose of the act to prevent preferences and discriminations in respect to rates and service."

Estoppel should not be invoked, for the purpose of the Interstate Commerce Act is to secure uniformity. As a consequence, tariff rules must be inflexible in their application and neither contract, estoppel, waiver, ignorance, nor mistake, will be invoked to escape strict application.

Texas & Pacific Ry. Co. v. Mugg & Dryden, 202 U. S. 242;

A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U. S. 662;

Pittsburgh, C. C. & St. L. Ry. Co. v. Fink, 250 U. S. 577;

New York Central & H. R. Ry. Co. v. York & Whitney Co., 256 U. S. 406;

Louisville & N. R.R. v. Central Iron & Coal Co., 265 U. S. 59.

Numerous claims are filed for damage to interstate freight shipments, which were paid in a total amount in excess of $119,000,000 during the past year; and

whenever the time limitation clause in Section 2(b) of the bill of lading is drawn in question, the carrier is faced with the problem of making a determination as to how this clause has been interpreted and should be applied. An acceptance of liability and payment of a claim may result in criticism and indictment for having given a preference to a shipper, and a refusal to accept liability and pay a claim will require the time and expense of litigation by a shipper in order that his rights may be determined. This question of vital importance to carriers and shipping parties throughout the United States can be determined and clarified by a granting of this petition and a consideration of the question by this Court.

In the last 12 years, petitions for certiorari have been presented to this Court in three previous cases involving this issue, all of which have been denied. The importance of this issue, as indicated herein and by the unusually large number of state and federal court decisions, demonstrates that there will be continuing litigation until this Court removes the conflicts and uncertainty which have developed since *Chesapeake & Ohio R.R. v. Martin* (1931), 283 U. S. 209.

3. The California Supreme Court Erred.

The California Court recognized that the written notice must indicate an intention to make a claim for damage to the shipment (Appendix "B," pp. B6-B7) But neither the inspection report, nor the notation as to damage, conveys any intention as to making a demand. Notwithstanding, the Court accepted these documents made by the carrier as constituting respondent's claim. Obviously, the carrier's inspection report could

not serve as a document in writing conveying respondent's intention to demand reimbursement because he had no knowledge of the existence of such document until almost four years after date of delivery of the shipment. At best, the documents upon which the Court relies are a *notice* of damage, not a *claim* for damage.

Regardless of any conclusion which may be drawn from the writings here involved, there is no evidence of record that respondent either requested, directed or insisted that they be made for his account or on his behalf. They were made by carrier's agent for its own account.

The California Court states that "While some of the cases indicate that the claim should emanate from the shipper . . . it is not settled law that the claim must be filed by the shipper personally." (Appendix "B," p. B10). Petitioner submits it is error to conclude, as did the California Court, that a claim need not be filed by a shipper, and is contrary to the spirit and intention of the statute and the bill of lading provision. This conclusion would have the effect of eliminating the time limitation clause in the bill of lading from having any force or effect because carriers uniformly make inspection reports of damaged shipments. The error is manifest when it is considered that under this decision the claimant is not required to file any writing, but that the carrier's own records can constitute a claim against itself.

Although the California Court recognized that Federal law governed, it arrived at a conclusion diametrically opposed to *Northern Pacific Ry. Co. v. Mackie*, 9 Cir., 195 F. 2d 641 (1952). In both cases damage

was called to the carrier's attention, after which an inspection was made to confirm the damage and thereafter conversations were had between the claimant and the carrier but no writing of any kind was sent to the carrier. There was only one added factor in the California case and that is the carrier's agent wrote on a shipping document that there was "Damage on this shipment." The Ninth Circuit Court of Appeals held there was no compliance with the bill of lading section; whereas the California Court held there was a compliance. The conflict between these two cases is direct on facts that are substantially indistinguishable.

The Court in *White Cross Hospital v. Chesapeake & Ohio Ry. Co.* (C. A. Ohio), 125 N. E. 2d 363 (1953), stated that Ohio "may not undertake to say that the provisions in the bill of lading involving the shipment in this case may be ignored, since to do so would be to usurp the functions of the Federal Court."

It is submitted the California Supreme Court ignored the requirement of a claim in writing, something the Ohio court and many other state and federal courts have refused to do in the absence of a clear cut indication from this Court that the strict requirements of the Act should be relaxed.

In the interstate transportation of freight there should be no circumstances where preferred shippers may, with impunity, be granted a preference by the payment of a freight claim not seasonably filed. Last year, nearly 300,000 freight claims were filed against the transportation system operated by Southern Pacific Company, of which petitioner is a part. It is obvious that from a regulatory standpoint, considering the task

imposed by the vast number of claims involved, there would be less opportunity for collusion when a claimant is required to place his demand for reimbursement in writing, which under this decision he is not required to do so long as the carrier has made a writing to itself.

It is submitted the California Supreme Court erred and decision of the District Court of Appeal accurately expresses what the law should be in this case.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: June 21, 1961.

Respectfully submitted,

GEORGE L. BULAND,
ALBERT T. SUTER,
E. D. YEOMANS,
WALT A. STEIGER,
Counsel for Petitioner.

APPENDIX "A".

Opinion of the District Court of Appeal.

[Civ. No. 24230. Second Dist., Div. Two. Aug. 25, 1960.]

Ernest H. Thayer, Respondent, v. Pacific Railway Company (a Corporation), Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Jesse J. Frampton, Judge. Reversed.

Action against an interstate rail carrier for damages to a precision grinding machine. Judgment for plaintiff reversed.

E. D. Yeomans, Walt A. Steiger and John H. Gordon for Appellant.

Dryden, Harrington, Horgan & Swartz and Vernon G. Foster for Respondent.

Fox, P. J.—The plaintiff instituted suit against the defendant, an interstate rail carrier, to recover damages to a precision grinding machine which had been shipped from Park Ridge, Illinois, to the plaintiff in Artesia, California, early in 1955. The parties agreed that the machine was damaged during the transit to the extent of $3,750 and judgment for that amount plus costs was awarded to the plaintiff. The defendant has appealed.

The sole issue raised by the defendant is whether or not, as a matter of law, the plaintiff satisfied the re-

quirement of section 2(b) of the bill of lading[1] that a claim in writing be presented to the carrier within nine months after delivery of the property.

The court below concluded that "[o]n or about April 20, 1955, plaintiff presented a written claim to defendant within the meaning of section 2(b) of the bill of lading." In order to ascertain the merits of the defendant's assertion of error we must closely scrutinize the series of transactions occurring in March and April of 1955 between the plaintiff and the defendant's agent Hileman.

On March 30, 1955, the plaintiff discovered that the shipment was damaged, called the defendant by telephone and requested that an inspection be made. The defendant's agent, Hileman, made an inspection and filed a written report thereof in the normal course and procedure of the defendant's business. At that time Hileman handed to the plaintiff blank claim forms which were to be filled out by the plaintiff and returned to the defendant. Plaintiff stated that he "had no idea of the extent of the damages," and was told "to send [the claim] in when [he] obtained the information."

Thereafter, on April 20, 1955, the plaintiff was contacted by Hileman regarding payment of the freight bill. Plaintiff was hesitant to make payment because

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[1]Section 2(b) of the bill of lading is as follows: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property. . . . Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

of the damage to the machine, but Hileman informed him that it was a separate matter which had nothing to do with the freight charges. The plaintiff testified that he was still reluctant to pay the freight bill because he "thought it might be considered an overall settlement, and . . . didn't want to waive [his] rights to collect for the damages." Plaintiff further testified that Hileman made a notation on the delivery receipt "to the effect that the machine had been damaged in shipment"; that he thereafter paid the freight bill, and that he would not have paid it if Hileman had not made the notation. The notation read "Damage on this shipment," followed by the date and Hileman's signature. This document became a part of defendant's files.

On January 27, 1956, nearly 10 months after the delivery of the shipment, the plaintiff wrote to the defendant summarizing the costs of repair and requesting advice as to further steps. The defendant replied, enclosing claim forms which were filed thereafter. No writing initiated by the plaintiff reached the defendant within the required nine-month period. If we are to sustain the judgment below, it must be on the basis that either Hileman's inspection report of March 30, 1955, or his notation across the face of the delivery receipt on April 20, 1955, constituted a claim in writing to defendant required by section 2(b) of the bill of lading.

It is evident from the posture of the case and the agreement of the parties[2] that (1) federal law, as

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[2] Pl. Claim. Brief, page 5 contained the following: "Respondent concedes that the filing of a claim is a condition precedent to suit upon the bill of lading . . . and that rights of the parties under the bill of lading is a matter of Federal Law."

enunciated by the Carmack Amendmer to the Interstate Commerce Act (tit. 49 U. S. C. A., §20 (11)), controls the rights of the parties under the bill of lading; (2) the Carmack Amendment requires filing of a written claim within nine months as a condition precedent to suit upon the bill of lading; and (3) the question of "[w]hat constitutes a claim 'in writing' within the meaning of the bill of lading provision, and whether there may be a 'waiver' or an 'estoppel' dispensing with the necessity of compliance with such a condition, are federal questions on which the Supreme Court of the United States has the final word." (Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675, 680; Northern Pac. Ry. Co. v. Mackie, 195 F. 2d 641, 642; Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 195 [36 S. Ct. 541, 60 L. Ed. 948].)

It has been long settled that such a time limitation upon the filing of a claim is reasonable (Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 212 [51 S. Ct. 453, 454, 75 L. Ed. 983]; Northern Pac. Ry. Co. v. Mackie, *supra*, at 642), and that mere oral notice cannot be deemed compliance with the requirement that a *written* claim be filed with the carrier. (Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., *supra*; see also St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird, 243 U. S. 592, 605 [37 S. Ct. 462, 468, 61 L. Ed. 917].) The plaintiff's contention that the transactions between himself and the defend-

ant's agent Hileman constituted a substantial compliance with the requirement of a written claim must be examined in the light of the controlling federal decisions.

First, we must examine the written inspection report of March 30th, which was made by Hileman in the normal and routine course of the defendant's business. This report was not made by the plaintiff. At this point plaintiff did nothing more than give Hileman oral notice that the grinding machine had been damaged and request him to inspect the same. The cases have uniformly held that such notice is not compliance with the statute. (Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., *supra*; East Texas Motor Freight Lines v. United States, 239 F. 2d 417.) In Northern Pac. Ry. Co. v. Mackie, *supra*, the court stated: "A study of the federal decisions, including those of the Supreme Court, makes it clear that some sort of written notice of claim is essential It is not enough that a carrier had actual knowledge that damage occurred, or that an oral claim for damages was made." In Penn State Laundry Co. v. Pennsylvania Railroad Co., 134 F. Supp. 955, the claimant gave oral notification of the claim and made affirmative efforts to obtain payment within the nine month period and the defendant prepared a written damage report as a result of the notice. The court, citing Chesapeake & Ohio Ry. Co. v. Martin, *supra*, and Northern Pac. Ry. v. Mackie, *supra*, among others, answered the claimant's

contention that this was substantial compliance by stating at p. 956 that "the decided cases are squarely opposed." The same conclusion applies with equal force to Hileman's report of March 30, 1955. In addition, at that very time the defendant's agent gave the plaintiff claim forms which were to be filled out and filed. There is nothing in this phase of the case which would indicate a compliance with the provisions of section 2(b).

Likewise, the contention that the transaction of April 20, 1955, constituted a written claim by the plaintiff is unmeritorious. The plaintiff testified that he had no idea of the extent of the damages on March 30th. He did not file his written claim until the following January. It is apparent that he did not have the damage information on April 20th and he did not have any intent to file a claim at that time. His testimony indicated that he wanted the notation made on the freight delivery receipt in order that his payment of freight charges would not constitute a waiver of his right to file a claim and collect damages in the future. The cases have uniformly held that a written claim must be filed by the person damaged. (Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., 188 F. 2d 343, 345, cert. den., 342 U. S. 833 [72 S. Ct. 53, 96 L. Ed. 630].) In the Delphi case, *supra*, the assertion of damage made by persons who had contracted for the goods, title to which had not passed and *who were not agents of the owner* did not constitute the written claim re-

quired by section 2(b). So, in the case at bar, it cannot be successfully argued that the written notation on the delivery receipt which was made by the *agent of the defendant* for purposes other than the filing of a claim, constitutes compliance with the requirement that the claimant file a written claim with the carrier.

The case of Hopper Paper Co. v. Baltimore & O. R. Co., 178 F. 2d 179, requires consideration. In that case the loss occurred in a wreck between two of the defendant's trains. After disposing of the shipment for salvage value, the defendant telegraphed the plaintiff the information regarding the loss. Eleven months thereafter the plaintiff filed his claim which the court allowed. The decision in the Hopper case has been referred to as one involving unusual circumstances and based upon its own peculiar facts (Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., *supra;* Northern Pac. Ry Co. v. Mackie, *supra*, 195 F. 2d 641, 643), and as "perhaps out of line with the other cases." (Insurance Co. of North America v. Newtowne Mfg. Co., *supra*, 187 F. 2d 675, 681.) It is clearly distinguishable from the instant case in that (1) the railroad sent the plaintiff a writing admitting liability, and (2) the circumstances of both the loss and salvage were wholly within the knowledge of the railroad.

Plaintiff relies on Loveless v. Universal Carloading & Distributing Co., 225 F. 2d 637. In the Loveless case, the carrier noted the damage on the consignment memo and, more importantly, sent a letter acknowledg-

ing the damages *and its own liability* to the plaintiff. Additionally, there were extensive dealings between the parties concerning the shipment. It was the written acknowledgment of liability that was decisive in that case. We have no such acknowledgment or other equivalent circumstances in the instant case. Consequently, the Loveless case is not here applicable.

The plaintiff has not urged that the defendant's conduct amounted to a waiver of the nine-month requirement or that an estoppel was created. Nor could such argument prevail since the law is settled that there can be no waiver or estoppel regarding section 2(b). (Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., *supra*, 241 U. S. 190, 197 [36 S. Ct. 541, 544, 60 L. Ed. 948]; Northern Pac. Ry. Co. v. Mackie, *supra*, 195 F. 2d 641, 642; Chesapeake & Ohio R. Co. v. Martin, 283 U. S. 209, 222 [51 S. Ct. 453, 75 L. Ed. 983].) The court in the Blish Milling Co. case, *supra*, stated the rule and reason therefor as follows: ". . . the parties could not *waive* the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier *by its conduct* give the shipper the right to ignore these terms which were applicable to that conduct [estoppel], and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would *antagonize the plain policy of the act* and *open the door to the very abuses at which the act was aimed.*" (241 U. S. at

197.) (Emphasis added.) The above rule is based upon the requirement that carriers must avoid preferences and discriminations among shippers. Carriers of necessity must therefore decline to pay all claims which are not timely filed. To pay the claims of some and not of all would be obvious discrimination. The policy of the act is well stated in the Martin case, *supra*, where the court held that to allow carriers to pay claims not timely filed "would be to alter the terms of a contract, made in pursuance of the Interstate Commerce Act and having, in effect, the quality of a statute of limitation, and thus to open the door for evasions of the spirit and purpose of the act to prevent preferences and discrimination in respect of rates and services." (283 U. S. at 222. See also A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U. S. 662 [35 S. Ct. 444, 59 L. Ed. 774].)

We are bound by the principles of federal law herein cited. And, while the result may seem harsh, we cannot deviate from or ignore those principles which are here controlling. "The strictness with which the policy of the legislation is adhered to may sometimes make hard cases, and sometimes it is the carrier that suffers by the strictness." (Insurance Co. of America v. Newtowne Mfg. Co., *supra*, 187 F. 2d 675, 681.) Here the equities seem to favor the shipper but the result was caused by his own inaction. Moreover, equities alone are not enough to justify a departure from a clearly

defined and long recognized legal principle and the plain provisions of the contract between the parties.

The judgment is reversed.

Ashburn, *J.*, and Richards, *J. pro tem.*,* concurred.

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*Assigned by Chairman of Judicial Council.

APPENDIX "B".

Opinion of the Supreme Court.

[L. A. No. 26080. In Bank. Mar. 2, 1961.]

Ernest H. Thayer, Respondent, v. Pacific Electric Railway Company (a Corporation), Appellant.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 24230 (184 A. C. A. 120, 7 Cal. Rptr. 222) reversing judgment of the superior court. Judgment affirmed.]

Appeal from a judgment of the Superior Court of Los Angeles County. Jesse J. Frampton, Judge. Affirmed.

Action by a shipper against an interstate rail carrier for damages to a machine damaged in shipment. Judgment for plaintiff affirmed.

E. D. Yeomans, Walt A. Steiger and John H. Gordon for Appellant.

Dryden, Harrington, Horgan & Swartz and Vernon G. Foster for Respondent.

White, J.—This is an appeal by the Pacific Electric Railway Company from a judgment for the plaintiff in the amount of $3,750 in an action for damages to freight of which defendant was the terminal carrier. The principal question raised is whether the plaintiff complied with the requirement of the bill of lading that in order to recover for damages to freight, a claim in writing must be filed with the carrier within nine months after delivery of the property.

The plaintiff is a Long Beach manufacturer of precision-made aircraft parts. In 1955, he purchased a

precision grinding machine that was then located in Illinois, and arranged to have the machine shipped to Artesia, California. The machine was in good condition when delivered to the originating carrier. On March 29, 1955, defendant's agent notified the plaintiff that the machine had arrived. Plaintiff contacted a firm of machinery movers and instructed them to remove it from the railroad car. When they went to pick up the machine on March 30, 1955, the movers observed that the machine was damaged. Before moving it from the railroad car, they contacted the plaintiff who made a personal inspection that same day.

The machine was severely damaged, even though it was bolted to heavy, wooden skids which in turn were bolted to the bottom of the box car. The boards on the bottom of the car had been jerked loose, breaking the blocks which were supporting the machine. The plaintiff had photographs taken of the damaged interior of the car and the damaged machine. After the plaintiff had returned to his office, he telephoned defendant's station agent, Carl Hileman, and complained about the condition of the machine. In response to the complaint, the agent visually inspected the machine and the box car and filled out a standard company form used for the inspection of damages. The plaintiff did not accompany the agent when the inspection was made or when the inspection form was filled out. Hileman's inspection report became a part of defendant's permanent files.

After completing the inspection, Hileman returned to plaintiff's office and there ensued a discussion over the condition of the machine. Before departing, the agent gave the plaintiff standard claim forms, explaining that

they could be filled out and returned by plaintiff when the extent of the damage was ascertained. After the photographer had performed his function and Hileman had completed his inspection, plaintiff had the movers take the machine from the box car.

Representatives of the defendant negotiated with plaintiff over the amount due for freight charges, and after plaintiff rejected two bills because of the application of improper rate and weight standards, the freight charges were fixed at approximately $550. However, in spite of requests by defendant's agents, plaintiff refused to pay the charges. He insisted that the defendant owed him money because of the extensive damage to the machine.

On April 20, 1955, Hileman went to plaintiff's office in an attempt to collect the freight charges. He explained to plaintiff that the damage claim was a separate matter from the freight charges and that the freight bill had to be paid in spite of the damage. The plaintiff continued to object to payment, since he did not want to waive any of his rights to collect for the damages. Finally, while in plaintiff's office, the agent wrote on the freight bill, "Damage on this shipment, 4-20-55, C. D. Hileman." The plaintiff then wrote a check for the amount of the charge and received a copy of the annotated freight bill. Plaintiff testified that he would not have paid unless Hileman had made the above notation on the freight bill. A copy of the annotated freight bill was kept as a permanent record in defendant's offices. The latter's damage claim agent testified that claims for damaged freight are not always filed with his office and that they may be filed "With any agent of the company."

Determination by the plaintiff of the extent of damages to the machine took considerable time. It was necessary to secure cost estimates from machinery repairmen, and then, because of the extent of the damage, ascertain whether it would be cheaper to obtain another machine. After inquiry in the eastern machinery market, plaintiff had his machine repaired at an approximate cost of $3,500.

Plaintiff's attorney wrote to the defendant's claim agent on January 27, 1956, over nine months after the delivery of the machine, and detailed the extent of plaintiff's damages. On February 2, 1956, the claim agent replied to plaintiff's attorney, specifying the documents that must accompany the formal claim and enclosing formal claim forms. The claim agent's letter began, "Referring to your letter of January 27, notifying this company that you represent Mr. Ernest Thayer in matters pertaining to claims for damages to a Cincinnati Grinding Machine, which occurred in transit on or about March 29, 1955. . . ." The letter ended, "On receipt of claim properly supported, as indicated, the matter will be progressed. In replying, please make reference to our above file."

The plaintiff's completed claim forms were received by defendant's claim agent on May 18, 1956. Four days later, that office sent plaintiff a postal card acknowledging receipt of his formal claim. The latter card was a routine communication sent out when a claim was assigned a claim number. On June 29, 1956, the claim agent formally rejected plaintiff's claim, on the grounds that it had not been filed in writing within nine months, as required by a condition set forth on the bill of lading.

Section 2(b) of the bill of lading provided: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property, . . .; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

Trial was commenced before a jury, but after all the evidence was in the jury was excused by consent of both parties. It was stipulated that if the plaintiff was to recover at all, he was to recover $3,750. Defendant did not deny liability, if notice by the plaintiff complied with the requirements in section 2(b) of the bill of lading. The trial court found that the inspection report made by the agent, Hileman, coupled with the notation made on the freight bill on April 20, 1955, constituted sufficient writings within the requirements of section 2(b) as construed in the federal cases. The trial court was of the opinion that because these two writings became a part of defendant's records, the instant carrier was on written notice that the plaintiff was claiming damages, so that the defendant could make a timely investigation in order to protect itself.

Whether the plaintiff complied with the requirements of section 2(b) of the bill of lading for this interstate shipment presents a question of federal law. (Chesa-

peake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 213, 221 [51 S. Ct. 453, 75 L. Ed. 983]; Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675, 680; see New York Cent. R. R. Co. v. F. H. Buck Co., 2 Cal. 2d 384, 389 [41 P. 2d 547]; American Fruit Distributors v. Hines, 55 Cal. App. 377, 379 [203 P. 821].) There is no question of the validity of such a provision requiring timely written notice to the carrier, as a condition precedent to the prosecution of a claim for damages to freight. (49 U.S.C. §20 (11); Chesapeake & Ohio Ry. Co. v. Martin, *supra*, 283 U.S. 209, 212-213 [51 S. Ct. 453, 75 L. Ed. 983]; Northern Pac. Ry. Co. v. Mackie, 195 F. 2d 641, 642.) Nor may the doctrines of waiver or estoppel be applied against the defendant carrier in order to obviate the requirement of written notice. (Southern Pac. Co. v. Stewart, 248 U.S. 446, 449-450 [39 S. Ct. 139, 63 L. Ed. 350]; Loveless v. Universal Carloading & Distributing Co., 225 F. 2d 637, 639; but see Chesapeake & Ohio Ry. Co. v. Martin, *supra*, 283 U. S. 209, 222 [51 S. Ct. 453, 75 L. Ed. 983]; Insurance Co. of North America v. Newtowne Mfg. Co., *supra*, 187 F. 2d 675, 681-682.)

However, even though as a rule the carrier must be given written notice of a claim within the period specified in the bill of lading, it has been said that the notice requirement, "does not require documents in a particular form. It is addressed to a practical exigency, and it is to be construed in a practical way." (Georgia, F. & A. Ry. v. Blish Mill. Co., 241 U. S. 190, 198 [36 S. Ct. 541, 60 L. Ed. 948]; see Thompson v. James G. McCarrick Co., 205 F. 2d 897, 901.) The principal object of the provision is to give the

carrier written notice of the claimed damage to a particular shipment, and written notice that the shipper intends to make a claim for damage to that shipment, so that the carrier may make a timely investigation and protect itself from fraudulent claims. (St. Louis, I. Mt. & So. Ry. Co. v. Starbird, 243 U. S. 592, 606 [37 S. Ct. 462, 61 L. Ed. 917]; Loveless v. Universal Carloading & Distributing Co., *supra*, 225 F. 2d 637, 639; Thompson v. James G. McCarrick Co., *supra*, 205 F. 2d 897, 901; Minot Beverage Co. v. Minneapolis & St. Louis Ry. Co., 65 F. Supp. 293, 296.) It has been said that, "The written notice which is to be considered in a 'practical way,' is sufficient if a carrier cannot draw any inference from it other than that a claim for damages was contemplated, even if the writing does not contain a formal demand for damages." (Delaware L. & W. R. Co. v. United States, 123 F. Supp. 579, 582.) Another federal court has stated that the written documents need be of a minimal character only, ". . . informal in expression, indicating an intention on the shipper's part to claim reimbursement from the carrier for a loss asserted to have occurred in the past. . . ." (Insurance Co. of North America v. Newtowne Mfg. Co., *supra*, 187 F. 2d 675, 681.)

Defendant does not contend that it did not have actual notice of plaintiff's intention to file a claim, and indeed the trial court found that the inspection report and the annotated freight bill were treated by the defendant carrier as the first step by the plaintiff in the filing of his claim. On the instant facts it appears that because of the combination of the inspection report, and the notation on the freight bill made on April 20, 1955, the defendant carrier did have written notice

that the plaintiff intended to file a claim for damages to his grinding machine. While it does not appear that the precise factual situation in the case at bar has been ruled upon, the holding of the trial court is supported by the following authorities: (Georgia, F. & A. Ry. Co. v. Blish Mill. Co., *supra*, 241 U. S. 190, 198 [36 S. Ct. 541, 60 L. Ed. 948]; Loveless v. Universal Carloading & Distributing Co., *supra*, 225 F. 2d 637, 638, 641; Thompson v. James G. McCarrick Co., *supra*, 205 F. 2d 897 901; Delaware, L. & W. R. Co. v. United States, *supra*, 123 F. Supp. 579, 582-583; Minot Beverage Co. v. Minneapolis & St. Louis Ry. Co., *supra*, 65 F. Supp. 293, 295-296; Illinois Cent. R. Co. v. Rogers & Hurdle, 116 Miss. 99, 110-111 [76 So. 686]; Snyder v. King, 199 Mich. 345, 355-357 [165 N. W. 840, 1 A. L. R. 893]; United Brokers Co. v. Southern Pac. Co., 86 Ore. 607, 613-615 [169 P. 114, Ann. Cas. 1918D 814]; Fisk Rubber Co. v. New York, New Haven & H. R. R., 240 Mass. 40, 43-44 [132 N. E. 714]; Everest v. Railway Express Agency, Inc., 204 Okla. 450, 452-454 [230 P. 2d 900]; West Coast Marketing Corp. v. New York, N. H. & H. R. Co., 106 N. Y. Supp. 2d 15, 16; Bond Stores, Inc. v. Overland Package Freight Service, Inc., 171 Misc. 135, 136-138 [13 N. Y. S. 2d 928]; Payne v. Smith (Tex. Civ. App.), 268 S W. 243, 244-245; see Hinkle v. Southern R. Co., 126 N. C. 932, 939-940 [36 S. E. 348, 78 Am. St. Rep. 685]).

Defendant relies heavily on the decision of the Ninth Circuit Court of Appeals in Northern Pac. Ry. Co. v. Mackie, 195 F. 2d 641. But in Mackie, there were no writings sent to the defendant carrier within the nine months' period. Defendant also relies on the holding

in Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675, but as in Mackie, there was no writing within the specified period. Furthermore, dicta in both cases suggests that the respective plaintiffs would have recovered, had some minimal written document been filed with the defendants within the nine months' period. (Northern Pac. Ry. Co. v. Mackie, *supra*, 195 F. 2d 641, 642-643; Insurance Co. of North America v. Newtowne Mfg. Co., *supra*, 187 F. 2d 675, 681.) The following additional cases cited by defendant are distinguishable: (Chesapeake & Ohio Ry. Co. v. Martin, *supra*, 283 U. S. 209 [51 S. Ct. 453, 75 L. Ed. 983]; Southern Pac. Co. v. Stewart, *supra*, 248 U. S. 446 [39 S. Ct. 139, 63 L. Ed. 350]; East Texas Motor Freight Lines v. United States, 239 F. 2d 417; Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., 188 F. 2d 343; Penn State Laundry Co. v. Pennsylvania Railroad Co., 134 F. Supp. 955).

At the oral argument defendant referred the court to statements in the recently decided case of Transmix Corp. v. Southern Pac. Co.,[1] 187 Cal. App. 2d ....., ... [9 Cal. Rptr. 714]. While generally favorable to defendant's position, the cited statements in Transmix are not persuasive in the determination of the instant case. Defendants also referred the court to Rhode Island Tool Co. v. New York, N. H. & H. R. R. Co., 83 R. I. 201 [114 A. 2d 404], but the latter case is clearly distinguishable on its facts.

Defendant further contends as a matter of law that at the time when the notation, "Damage on this shipment," was made on April 20, 1955, the plaintiff was

[1]Advance Report Citation: 187 A. C. A. 299, 306-307.

not evidencing an intention to file a claim for damages, but was only seeking to avoid the waiver of his rights to file a claim for damages at a later date. While the inference for which defendant contends has some support in the record and may be a permissible factual inference to draw from the testimony, the trial court drew the contrary inference that the plaintiff was thereby notifying the defendant carrier in writing of his intention to file a claim for damages. Where opposing factual inferences may reasonably be drawn from the same evidence, the inference drawn by the trial court may not be disturbed by an appellate tribunal. (Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429 [45 P. 2d 183]; Tidlund v. Seven Up Bottling Co., 154 Cal. App. 2d 663, 665-666 [316 P. 2d 656].)

Defendant also contends that neither the inspection report nor the notation on the freight bill may be said to comply with the writing requirement of section 2(b) of the bill of lading, because both writings were made by defendant's agent, Hileman, and, defendant further contends, the claim in writing must be made by the claimant. While some of the cases indicate that the claim should emanate from the shipper (see Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., *supra*, 188 F. 2d 343, 345-346; Penn State Laundry Co. v. Pennsylvania Railroad Co., *supra*, 134 F. Supp. 955, 956-957), it is not settled law that the claim must be filed by the shipper personally. (See Loveless v. Universal Carloading & Distributing Co., *supra*, 225 F. 2d 637, 641.) Nor would it seem to be necessary that the claim be filed by the shipper, so long as the defendant carrier was given authoritative notice in writ-

ing that the shipper intends to claim damages. (See Insurance Co. of North America v. Newtowne Mfg. Co., *supra*, 187 F. 2d 675, 680-681.)

But even assuming that defendant is correct in its contention that the claim must emanate from the shipper, the trial court reached the conclusion that the notation on the freight bill was written by Hileman at plaintiff's insistence. Such a conclusion by the trier of fact finds support in the evidence and therefore may not be disturbed on appeal. (Crawford v. Southern Pacific Co., *supra*, 3 Cal. 2d 427, 429.) Thus, even though Hileman was employed by the defendant railway, he became plaintiff's agent for the purpose of noting on the freight bill that the plaintiff intended to claim damages because of the condition of his machine. (T. J. Moss Tie Co. v. Stamp (Mo. App.), 25 S. W. 2d 138, 141; Rest., Agency, 2d, § 141, (1), comment b; see Hiner v. Olson, 23 Cal. App. 2d 227, 230-231 [72 P. 2d 890, 73 P. 2d 945]; Pauly v. Pauly, 107 Cal. 8, 25-26 [40 P. 29, 48 Am. St. Rep. 98].) Also, the plaintiff need not have expressly made Hileman his agent for the purpose of noting plaintiff's intention to claim damages. The existence of an agency is a question of fact (Brokaw v. Black-Foxe Military Insitute, 37 Cal. 2d 274, 278 [231 P. 2d 816]), which may be implied from the conduct of the parties. (Smith v. Schuttpelz, 1 Cal. 2d 158, 161 [33 P. 2d 836].)

The judgment is affirmed.

Gibson, C. J., Traynor, J., Schauer, J., McComb, J., Peters J. and Dooling J. concurred.